RECORD
AND
BRIEFS

No. 10-1308

Supreme Court, U.S.
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In The
Supreme Court of the United States

DINA JAEGER,

Petitioner,

v.

CELLCO PARTNERSHIP, d/b/a VERIZON WIRELESS,
CONNECTICUT SITING COUNCIL,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

CONNECTICUT SITING COUNCIL'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Should the petition for certiorari be denied where the Second Circuit properly held that the Telecommunications Act of 1996 (TCA) preempted any claim based upon radio frequency emissions?

2. Should the petition for certiorari be denied where the Second Circuit properly held that the Migratory Bird Treaty Act (MBTA) did not provide standing to private citizens to sue state agencies?

3. Should the petition for certiorari be denied where there is no split between the circuits on any question applicable to this case?

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COUNTER-STATEMENT OF THE CASE

The petitioner, Dina Jaeger, seeks this Court's intervention to protest the approval by the Connecticut Siting Council (CSC) of the placement of a cell tower by Cellco Partnership, d/b/a Verizon Wireless ("Verizon") in petitioner's home town of Canaan, Connecticut. In her petition, plaintiff depicts her claims as having international impact, but these claims are belied by the record. Rather, the record reflects that the CSC properly applied state and federal law in its approval process, and the lower federal courts properly dismissed Petitioner's challenge.

The U.S. District Court and Second Circuit properly held that the Telecommunications Act of 1996, (TCA), particularly 47 U.S.C. § 332(c)(7)(B)(iv), preempted any claim based upon radio frequency (RF) emissions in compliance with Federal Communications Commission (FCC) standards in the placement of a cell tower. The Second Circuit also properly held that the Migratory Bird Treaty Act, 16 U.S.C. § 703(a) (MBTA), could not be used by the Petitioner to bar the placement of a cell tower in that the MBTA does not grant standing to a private citizen to sue a state agency. Finally, petitioner contends on page 2 of her petition that Conn. Gen. Stat. § 16-50v is unconstitutional, but by failing to brief the issue, abandons it. Further, the Second Circuit correctly held that the Petitioner lacked standing to sue for a declaratory ruling that Conn. Gen. Stat. § 16-50v is unconstitutional.

Petitioner contends that there are serious splits in U.S. Circuit decisions that justify the grant of certiorari. Because there are no splits between the circuits on any question applicable to the facts and legal issues presented in this case, and the Second Circuit properly applied the federal law of this Court, certiorari should be denied.

PROCEDURAL HISTORY

On or about March 28, 2008, Verizon filed an application for a certificate of environmental compatibility and public need for the construction, operation, and maintenance of a wireless telecommunications facility (commonly called a "cell tower") at 188 Route 7 South in the Falls Village section of Canaan, Connecticut with the CSC.[1] The CSC admitted the Petitioner, Dina Jaeger, as an intervenor in the proceeding and held public hearings on the application on July 1, 2008, and July 31, 2008. The CSC found from the evidence that the tower would be in compliance with the radio frequency RF emissions levels set by the Federal Communications Commission (FCC), a point not contested by the

[1] The CSC is a Connecticut state agency established by the Public Utility Environmental Standards Act, Conn. Gen. Stat. § 16-50g, et seq., specifically, Conn. Gen. Stat. § 16-50j. Among its powers is the adjudication of applications for the locations for cell towers.

Petitioner. On March 12, 2009, the CSC approved Verizon's application. *See* Petitioner's Appendix, pages 8a to 10a.

The Petitioner filed the instant case against the CSC and Verizon in the United States District Court for the District of Connecticut for a declaratory judgment and associated relief arising out of the Telecommunications Act of 1996, the International Migratory Bird Treaty, the Migratory Bird Treaty Act, the Bald and Golden Eagle Protection Act, the Supremacy Clause of Article VI of the United States Constitution, and the Fourth, Fifth, Ninth, Tenth and Fourteenth Amendments of the United States Constitution. *See* Petitioner's Appendix, pages 51a to 85a.

In her first through fourth claims for relief in the Complaint filed in the District Court, the Petitioner alleged that the construction and operation of the cellular tower will result in harmful RF emissions causing impermissible harm to protected fowl in violation of 16 U.S.C. § 703(a), the Migratory Bird Treaty Act (MBTA) and 16 U.S.C. § 668(a), the Bald and Golden Eagle Protection Act (BGEPA). *See* Petitioner's Appendix, pages 58a to 66a. The Petitioner essentially asserted that the MBTA and the BGEPA require the CSC to set RF emission levels for the protection of covered birds, regardless of the FCC's levels. (The Petitioner's Complaint with the

District Court contained additional claims, but her Petition to this Court only deals with the MBTA claim.)

The Defendants filed motions to dismiss the complaint. After receiving briefs and hearing oral argument, the Court, Stefan J. Underhill, J., granted the motions and dismissed the complaint by a decision dated March 15, 2010. *See* Petitioner's Appendix, pages 4a to 35a; unofficially reported at *Jaeger v. Cellco Partnership, d/b/a Verizon Wireless, and the Connecticut Siting Council*, 2010 U.S. Dist. LEXIS 24394 (D.Conn. 2010).

The Plaintiff subsequently appealed to the United States Court of Appeals for the Second Circuit. After receiving briefs and hearing oral argument, the Second Circuit issued a Summary Order affirming the District Court's decision on December 7, 2010. *See* Petitioner's Appendix, pages 1a to 3a; unofficially reported at *Jaeger v. Cellco Partnership, d/b/a Verizon Wireless, and the Connecticut Siting Council*, 2010 U.S. App. LEXIS 25014 (2d Cir. 2010). On February 1, 2011, the Second Circuit denied the Petitioner's petition for rehearing. *See* Petitioner's Appendix, pages 36a to 37a. The Petitioner subsequently filed the instant Petition for a Writ of Certiorari (hereinafter "Petition").

The Petitioner also filed an administrative appeal in the Connecticut Superior Court. The Superior Court dismissed her appeal. *Jaeger v. Connecticut*

Siting Council, 52 Conn. Sup. 14, ___ A.2d ___ (2010).[2] The Petitioner then appealed to the Connecticut Appellate Court, which affirmed the Superior Court's decision. *Jaeger v. Connecticut Siting Council*, 128 Conn. App. 243, ___ A.2d ___ (2011). The Plaintiff subsequently filed a Petition for Certification with the Connecticut Supreme Court, which is pending.

REASONS FOR DENYING THE WRIT

The Second Circuit properly held that the Telecommunications Act of 1996 (TCA), particularly 47 U.S.C. § 332(c)(7)(B)(iv), preempted any claim based upon RF emissions in compliance with Federal Communications Commission (FCC) standards in the placement of a cell tower. The Second Circuit also properly held that the Migratory Bird Treaty Act, 16 U.S.C. § 703(a) (MBTA), could not be used by the Petitioner to bar the placement of a cell tower because the MBTA did not provide standing to a private citizen to sue a state agency.

Because petitioner fails to raise any unusual federal legal issues, the petition for certiorari should be denied.

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[2] As of the submission of this Brief, the Superior Court decision cannot be retrieved online by utilizing the official citation. The decision may be found at 2010 Conn. Super. LEXIS 611.

A. THE SECOND CIRCUIT PROPERLY HELD THAT THE PROVISIONS OF THE TELECOMMUNICATIONS ACT OF 1996 REGARDING RF EMISSIONS PREEMPTS SECOND-GUESSING BY STATE AND LOCAL SITING AGENCIES.

The heart of this case is the precise meaning of 47 U.S.C. § 332(c)(7)(B)(iv), a portion of the Federal Telecommunications Act of 1996 (TCA), which states:

> No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [Federal Communications] Commission's regulations concerning such emissions.

47 U.S.C. § 332(c)(7)(B)(iv); *see* Petitioner's Appendix, pages 46a to 47a.

When construing a statute, the starting point is its plain language. *See Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450, 122 S.Ct. 941, 151 L.Ed.2d 908 (2002); *see also Caminetti v. United States*, 242 U.S. 470, 485, 37 S.Ct. 192, 61 L.Ed. 442 (1917) ("It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms."). The court must

first determine if the language at issue has a plain and unambiguous meaning. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 340, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997). If so, the court's inquiry ends.

The clear and plain language of this provision requires that if the RF emission levels of the proposed cell tower are within the limits set forth by the FCC, then the CSC cannot deny Verizon's application on the basis of the environmental effects of RF emissions, and the District Court and the Second Circuit so held. This is regardless of whether those effects are to human health or wildlife, resulting from thermal or non-thermal effects, or whether the FCC's limitations are based on up-to-date or outdated data or studies (all issues raised before the District Court). The Petitioner has conceded that the RF emissions from Verizon's proposed (and approved) tower will be less than the FCC's levels.

Despite the Petitioner's claims of conflict between the circuits, no court has held otherwise. On page 15 of the Petition, the Petitioner claims the existence of a conflict between the Second Circuit's decision in the instant case and that of the District of Columbia Circuit in *American Bird Conservancy v. Federal Communications Commission*, 516 F.3d 1027 (D.C. Cir. 2008), on the issue of whether the MBTA is preempted by the TCA. *See* Petition, pages 14-15. *American Bird Conservancy*, *supra*, however does NOT deal with either RF emissions or the TCA. Neither is mentioned in the case. Instead, the focus was on bird collisions with communications towers.

One of the issues discussed relating to why such collisions took place was the manner of tower lighting. *Id.*, at 1030.

In the present case, the Petitioner did not claim that the CSC ignored pleas regarding tower structure or lighting to prevent collisions. Such concerns would not invoke the preemptive provisions of the TCA. The Petitioner instead complained that the CSC did not regulate the tower on the basis of RF emissions, even though such emission levels met the FCC levels. This claim does conflict with the TCA. NO conflict exists between the circuits

As the courts below noted, Petitioner conceded that the TCA precluded claims based on RF emissions harm (Petitioner's Appendix, page 22a), but sought to challenge the preclusion because Petitioner believed the preclusion to be based on outdated and inadequate scientific data. *See* Petitioner's Appendix, pages 15a, 22a. Thus, under Petitioner's interpretation, each siting agency would have to adjudicate RF emission levels safe for birds, regardless of whether the RF emission levels were within FCC limits. Such a view would rob the preemptive provisions of the TCA of all meaning. In *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 125 S.Ct. 1453, 161 L.Ed.2d 316 (2005), this Court stated that the purpose of the TCA was "to promote competition and higher quality in American telecommunications services" and, in so doing, to reduce "the impediments imposed by local governments upon the installation of facilities for wireless communications, such as antenna towers."

Id. at 115-116. In a concurring opinion, Justice Breyer, referring to the legislative history of the TCA (especially the Reports of the U.S. House of Representatives), noted:

> Context here, for example, makes clear that Congress saw a national problem, namely an "inconsistent and, at times, conflicting patchwork" of state and local siting requirements, which threatened "the deployment" of a national wireless communication system. H. R. Rep. No. 104-204, pt. 1, p. 94 (1995).

Id. at 127-128.

In *Southwestern Bell Wireless, Inc. v. Board of County Commissioners of Johnson County*, 199 F.3d 1185 (10th Cir. 1999), *cert. denied*, 530 U.S. 1204, 120 S.Ct. 2199, 147 L.Ed.2d 234 (2000), the Tenth Circuit noted that, "A patchwork of varied local regulations across the country would *prevent* a functional national telecommunications network." *Id.* at 1193 (emphasis added). To adopt a contrary interpretation of the TCA would reinstitute a patchwork of RF emission standards across the country, as each State and local siting entity would have to adjudicate RF emission standards for wildlife. The FCC regulations would be rendered meaningless, as would the statutory provision in question. As this Court noted in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 115 S.Ct. 1447, 131 L.Ed.2d 328 (1995), rendering a statute "utterly without effect" is "a result to be avoided, if possible." *Id.* 216. Far from fostering

a "functional national telecommunications network" the Petitioner's position would foster a fractured, dysfunctional network, having to meet different RF emission standards for each State, and, in States where siting is done by local agencies, different standards for each county or municipality.

The plain meaning interpretation of 47 U.S.C. § 332(c)(7)(B)(iv) of the TCA is that it expressly preempts Council regulation of RF emissions for the protection of wildlife (so long as the RF emission levels in question are within the FCC limits), and that such interpretation fully comports with the intent of Congress and does not yield absurd results.

The Petitioner argues that the MBTA enforces a treaty as "the supreme law of the land." *See* Petition, page 23. However, in *Breard v. Greene*, 523 U.S. 371, 118 S.Ct. 1352, 140 L.Ed.2d 529 (1998), this Court held:

> [A]lthough treaties are recognized by our Constitution as the supreme law of the land, that status is no less true of provisions of the Constitution itself, to which rules of procedural default apply. We have held "that an Act of Congress . . . is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null." *Reid v. Covert*, 354 U.S. 1, 18, 1 L.Ed.2d 1148, 77 S. Ct. 1222 (1957) (plurality opinion); see also *Whitney v. Robertson*, 124 U.S. 190, 194, 31 L.Ed. 386,

> 8 S. Ct. 456 (1888) (holding that if a treaty and a federal statute conflict, "the one last in date will control the other").

Id., at 376.

Presumably that holding would cover both treaties and the statutes implementing them, such as the MBTA, and older statutes in general, such as the BGEPA, if they are in conflict with a more current statute. "Where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one." *The Last Best Beef, LLC v. Dudas*, 506 F.3d 333, 339 (4th Cir. 2007), quoting *Posadas v. National City Bank*, 296 U.S. 497, 503, 56 S.Ct. 349, 80 L.Ed.2d 351 (1936).

It is true that Title VI, Section 601(c)(1) of P.L. 104-104 (the TCA), 110 Stat. 143, has a provision that states, "This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments." To the degree, however, that the Plaintiff wishes these acts to be construed to require State and local government agencies to regulate RF emissions completely to the contrary of the TCA, then there is an irreconcilable conflict and the TCA has expressly superseded such acts. Clearly, Congress did not want State and local siting boards to be in the business of establishing RF emission standards, for that would recreate a "patchwork of varied local regulations

across the country" and "would prevent a functioning national telecommunications network." Such an interpretation would render the preemptive language of 47 U.S.C. § 332(c)(7)(B)(iv) meaningless. As this Court noted in *TRW Inc. v. Andrews*, 534 U.S. 19, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001):

> It is "a cardinal principle of statutory construction" that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *Duncan v. Walker*, 533 U.S. 167, 121 S. Ct. 2120, 2125, 150 L.Ed.2d 251 (2001) (internal quotation marks omitted); see *United States v. Menasche*, 348 U.S. 528, 538-539, 99 L.Ed. 615, 75 S. Ct. 513 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute.'" (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152, 27 L. Ed. 431, 2 S. Ct. 391 (1883))).

Id., at 31.

The Second Circuit's summary affirmation of the District Court does not conflict with any other circuit, especially because no other circuit has been presented with an attempt to use the MBTA to deprive the TCA's preemptive provisions regarding RF emissions of any meaning. In essence, the Petitioner is inviting this Court to apply the MBTA in a manner which repeals 47 U.S.C. § 332(c)(7)(B)(iv). This invitation must be declined.

B. THE SECOND CIRCUIT PROPERLY HELD THAT THE MBTA DOES NOT PROVIDE STANDING TO THE PETITIONER TO SUE STATE AGENCIES.

The Second Circuit properly found that the MBTA does not provide the Petitioner with standing to sue a state agency, such as the CSC. On pages 16 and 17 of her Petition, the Petitioner alleged that a conflict exists between the circuits regarding the application of the MBTA to federal and state government agencies. The instant case, however, deals with the actions of one governmental agency—the CSC. The CSC is a Connecticut state agency, NOT a federal agency. The cases listed on one side of the issue, *American Bird Conservancy*, *supra*, and *Humane Society v. Glickman*, 217 F.3d 882 (D.C. Cir. 2000), did not address the issue of whether a state agency may be sued under the MBTA. Indeed, in *Humane Society v. Glickman*, *supra*, the District of Columbia Circuit stated, "In this appeal from the district court's order enjoining the Department of Agriculture from violating the statute, the question is whether the Migratory Bird Treaty Act prohibits *federal* agencies from killing or taking migratory birds without a permit from the Interior Department." *Id.*, at 883 (emphasis added). (Dicta in *Glickman*, *supra*, states that any person, including state officers, could be prosecuted for violating the MBTA's criminal sanctions. *Id.*, at 885-886. The Court also suggested that state agencies, however, would not be considered persons who could be prosecuted. *Id.*, and footnote 4.)

On pages 18-19 of her Petition, the Petitioner alleged a conflict between the circuits on whether private parties have standing to bring suit to enjoin violations of the MBTA. There is, however, no conflict. The Petitioner listed *Humane Society v. Glickman*, *supra*, and *Fund for Animals v. Kempthorne*, 472 F.3d 872 (D.C. Cir. 2001) for the proposition that private parties have standing. As the Petitioner acknowledged, however, both *Glickman* and *Kempthorne* found standing in the federal Administrative Procedure Act (APA), which does not apply to state agencies. *See* Petition, 16-17, 32.

In *Jaeger*, *supra*, the Second Circuit summarily affirmed the District Court, which directly addressed the APA standing claim as follows:

> Private plaintiffs may, via the Administrative Procedure Act ("APA"), pursue claims against federal agencies for failure to adhere to the MBTA and BGEPA. *See* 5 U.S.C. § 701; *see also Fund for Animals v. Norton*, 374 F. Supp. 2d 91, 98 (D.C. Cir. 2001); *Hill v. Norton*, 275 F.3d 98, 103, 348 U.S. App. D.C. 319 (D.C. Cir. 2001); *Humane Society of the United States v. Glickman*, 217 F.3d 882, 342 U.S. App. D.C. 376 (D.C. Cir. 2000). A private plaintiff, however, may not sue state or municipal agencies under the APA. *See* 5 U.S.C. § 701(b)(1) ("'agency' means each authority of the Government of the United States"); *see also Hunter v. Underwood*, 362 F.3d 468, 477 (8th Cir. 2004); *Western State University of California v. American Bar*

> *Ass'n*, 301 F. Supp. 2d 1129, 1133 (C.D. Cal. 2004). Because Jaeger lacks standing to enforce violations of the MBTA and BGEPA claims against a state entity and private company, her claims pursuant to those statutes must fail.

Petitioner's Appendix, pages 25a to 26a. As the courts below plainly set forth, there is no disagreement between the circuits on that relevant point.

Finally, the Petitioner alleges a conflict between this Court in *Missouri v. Holland*, 252 U.S. 416 (1920) (supported by *Humane Society v. Glickman*, *supra*) and the Second Circuit in the instant case as to whether the MBTA applies to state officers. *See* Petition, pages 19-20. There is no such conflict. As quoted above, the Second Circuit, in summarily affirming the District Court, held that private parties do not have standing under the MBTA and the BGEPA to sue a Connecticut state agency or a private company. Neither *Holland* nor *Glickman* hold otherwise. In sum, there are no relevant conflicts between the circuits that this Court must resolve.

Petitioner's reliance upon the Supremacy Clause of Article VI of the Constitution of the United States is also unavailing. *See* Petition, page 35. It is that very clause that prohibits the CSC from denying a cell tower application in whole or in part on the basis of the environmental effects of RF emissions when those emissions comply with the levels established by the FCC. In fact, the Petitioner does not discuss

the meaning of 47 U.S.C. § 332(c)(7)(B)(iv). The issue is not one of applying the Supremacy Clause to the CSC. The issue is, rather, interpreting the MBTA in a manner that does not render the TCA meaningless. The Second Circuit and the District Court have done so. The Petitioner has not even attempted to do so. Thus, there is no Federal question that must be decided by this Court at this time, as there is neither a split between the circuits nor a conflict between this Court and the Second Circuit.

C. THE PETITIONER'S CLAIM OF A SPLIT IN THE CIRCUITS REGARDING WHETHER THE FCC IS SUBJECT TO THE MBTA IS NOT RELEVANT AS THE FCC IS NOT A PARTY IN THE INSTANT CASE.

In her Point III, the Petitioner incorrectly contends that the Second Circuit decision in this matter "adds to the contradictory split" in four circuits over whether the MBTA applies to the FCC. *See* Petition, pages 38 to 40. The FCC was not, and is not, a party to the instant matter, and whether the MBTA applies to the FCC is not a legal issue presented herein. Any alleged split between the circuits on that issue simply does not apply to this case and cannot serve as a basis for granting certiorari.

CONCLUSION

For the reasons stated herein, the Petition for a Writ of Certiorari must be denied.

Respectfully submitted,

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